

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

**PUBLIC INVESTORS ARBITRATION
BAR ASSOCIATION**
2415 A Wilcox Drive
Norman, OK 73069

Plaintiff,

-against-

**UNITED STATES SECURITIES AND
EXCHANGE COMMISSION**
100 F. Street, N.E.
Washington, D.C. 20549

Defendant.

Case No. _____

COMPLAINT FOR DECLARATORY JUDGMENT

The Public Investors Arbitration Bar Association (“PIABA”) files this Complaint for Declaratory Judgment against the United States Securities and Exchange Commission (the “SEC”).

NATURE OF THE ACTION

1. This is an action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552 *et. seq.*, to compel compliance with FOIA, including production of records requested from the SEC on February 9, 2010.

JURISDICTION AND VENUE

2. This Court has jurisdiction pursuant to 5 U.S.C. § 552(a)(4)(B) and 28 U.S.C. § 1331.

3. Venue is proper in the District of Columbia pursuant to 5 U.S.C. § 552(a)(4)(B).

PARTIES

4. PIABA is a bar association whose members represent public investors in disputes with the securities industry. PIABA's mission is to serve the interests of the public investor in securities and commodities arbitration by protecting public investors from abuses in the arbitration process, such as those associated with the arbitrator selection process, document production, and discovery; making securities and commodities arbitration as just and fair as systematically possible; and creating a level playing field for the public investor in securities and commodities arbitration.

5. The SEC is an agency of the United States that has possession of and control over the agency records that are the subject of this action. The SEC's mission "is to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation."¹ It is the responsibility of the SEC to oversee Self-Regulatory Organizations in the securities field. 15 U.S.C. § 78s.

FACTUAL BACKGROUND

6. The Financial Industry Regulatory Authority (FINRA) is the largest independent regulatory organization for securities firms doing business in the United States.² FINRA's "mission is to protect America's investors by making sure the securities industry operates fairly and honestly."³ FINRA Dispute Resolution, Inc. (formerly known as the National Association of Securities Dealers (NASD) Dispute Resolution, Inc.), is a subsidiary company under the umbrella of FINRA (formerly the

¹ The Investor's Advocate: How the SEC Protects Investors, Maintains Market Integrity, and Facilitates Capital Formation, *available at* <http://www.sec.gov/about/whatwedo.shtml> (last visited November 15, 2011).

² FINRA, <http://www.finra.org/> (last visited November 15, 2011).

³ About the Financial Industry Regulatory Authority, <http://www.finra.org/AboutFINRA/> (last visited November 15, 2011).

National Association of Securities Dealers, Inc. (NASD)) charged with administering arbitration, mediation, and other alternative dispute resolution services.⁴ FINRA Dispute Resolution, Inc.'s role in dispute resolution is to be "separate[] . . . from the disciplinary role of [FINRA] Regulation [to] result in a more neutral and independent forum for the resolution of disputes between members, associated persons, and customers."⁵ Because FINRA is not an entity or agency of the United States it is not subject to FOIA.

7. On February 9, 2010, PIABA submitted a written request to the SEC under FOIA (hereafter "FOIA Request") seeking, for the period of January 1, 2000 to the date of the response:

- (1) Documents relating to audits, inspections, and reviews conducted by the [SEC] in connection with the arbitrator selection process of [FINRA];
- (2) Documents relating to audits, inspections, and reviews conducted by the SEC in connections with FINRA's appointment of replacement arbitrators in the event that an arbitrator is stricken as part of the list selection process or removed for cause;
- (3) Documents relating to audits, inspections, and reviews conducted by the SEC in connection with FINRA's policies, procedures, and processes in deciding causal challenges to an arbitrator's appointment;
- (4) Documents relating to audits, inspections, and reviews conducted by the SEC in connection with FINRA's internal policies and procedures regarding arbitrator selection, appointment, and replacement;
- (5) Documents relating to audits,

⁴ *NASD Launches New Dispute Resolution Subsidiary*, FINRA News Release, available at <http://www.finra.org/Newsroom/NewsReleases/2000/P011399> (last visited November 15, 2011).

⁵ Self-Regulatory Organizations: Order Approving a Proposed Rule Change by the National Association of Securities Dealers, Inc. to Create a Dispute Resolution Subsidiary, 64 Fed. Reg. 55793 (Sept. 30, 1999).

inspections, and reviews conducted by the SEC in connection with FINRA's pre-approval background check on arbitrator applicants; and (6) Documents relating to audits, inspections, and reviews conducted by the SEC in connection with FINRA's public arbitrator pilot program.

Exhibit 1. The SEC received PIABA's request on February 23, 2010.

8. On March 24, 2010, the SEC's FOIA/Privacy Act Office, in a letter to PIABA, announced that it was withholding all records responsive to PIABA's request, citing 5 U.S.C. § 552(b)(8) ("Exemption 8") in support of its decision. Exhibit 2. The SEC improperly refused to produce any records under a blanket assertion of Exemption 8. It also did not release any reasonably segregable portion of the withheld records or provide PIABA with a list or description of the withheld records as required under Exemption 8(b).

9. PIABA filed an administrative appeal of the SEC's decision with the SEC's General Counsel, pursuant to 5 U.S.C. 552(a)(6). Exhibit 3. PIABA maintained in its appeal that the SEC's denial of PIABA's request did not satisfy the purposes of Exemption 8. *Id.* Specifically, the appeal maintained that Congress by enacting Exemption 8:

sought to exempt financial institutions from producing information that would (1) lead to financial speculation or endanger the stability of any financial institution and (2) would undermine the regulatory relationship between agencies and the entities that agencies regulate in order to foster an environment of full cooperation. Thus, the legislative intent was meant to protect against the 'unwarranted runs on banks' . . .

Exhibit 3. The appeal maintained that the responsive documents, because they “would not undermine FINRA’s credibility as a ‘financial institution’ nor would they subvert the cooperative relationship between” FINRA and the SEC, do not properly fall within Exemption 8. Exhibit 3. The SEC’s FOIA/Privacy Act Office received PIABA’s appeal on April 1, 2011.

10. In a letter dated April 25, 2011, the SEC’s General Counsel’s office, by Assistant General Counsel Richard M. Humes, rejected PIABA’s appeal, stating that Exemption 8 properly applied because the withheld records “**were obtained or created during the course of an inspection conducted by Commission staff.**” (emphasis added) Exhibit 4. The SEC admits, therefore, the existence of the documents. The SEC, as a federal agency, is subject to FOIA and therefore has a duty to “make available to the public” any information that does not fall within one of the stated exemptions. 5 U.S.C. § 552. The SEC improperly failed to disclose any records responsive to PIABA’s request, specify what information was withheld, explain how the information withheld was “contained in or related to examination, operating, or condition reports,” 5 U.S.C. § 552(b)(8), and failed to disclose any reasonably segregated portion of the relevant documents.

11. As if to support its blanket assertion of Exemption 8, the SEC in its denial of PIABA’s appeal claimed that withholding the relevant documents “facilitates the staff’s oversight and supervision of [FINRA’s] activities” and therefore “advances the two principal purposes of Exemption 8: (1) to protect the security of financial institutions and (2) to promote cooperation and communication between regulated entities and their examiners.” The SEC’s letter claims that its broad interpretation of Exemption 8 satisfies

its legislative purpose of “protecting the integrity of financial institutions and facilitating cooperation between agencies and entities regulated by them” because “[d]isclosure would reveal very sensitive details collected by government agencies.” Beyond these generalized statements, the SEC did not offer any other information that would enable PIABA to evaluate whether the documents were indeed “contained in or related to examination, operating, or condition reports,” what the nature of the responsive documents were, or how disclosure of the documents would endanger FINRA’s integrity as a financial institution or the SEC’s relationship with FINRA.

12. As of the filing of this Complaint, the SEC has not disclosed any documents in response to PIABA’s FOIA Request or appeal and has not provided a list of documents withheld. The SEC also has failed to provide an estimate of the volume of records that are being withheld in their entirety as mandated by Exemption 8(d)(5)(iv).

CLAIM FOR RELIEF

FIRST CLAIM FOR RELIEF (Declaratory Judgment)

13. PIABA repeats and realleges all of the allegations set forth in paragraphs 1 through 12 above.

14. An actual, present and justiciable controversy exists between Plaintiff PIABA and Defendant SEC in that PIABA has requested documents from the SEC under the Freedom of Information Act and the SEC contends that the documents are exempt from disclosure pursuant to Exemption 8.

15. PIABA has exhausted all required and available administrative remedies.

16. PIABA seeks a declaratory judgment from this Court declaring that all of the documents in the custody and control of the SEC, which are covered by PIABA's FOIA Request, must be disclosed to PIABA and that such documents are not protected from disclosure by Exemption 8.

17. Alternatively, PIABA seeks a declaratory judgment from this Court declaring that portions of the documents in the custody and control of the SEC, which are covered by PIABA's FOIA Request, are reasonably segregable, must be disclosed to PIABA, and that portions of such documents are not protected from disclosure by Exemption 8.

18. PIABA requests the Court to award it reasonable attorneys' fees, expenses, and costs incurred in this action pursuant to 5 U.S.C. § 552(a)(4)(E).

19. PIABA requests the Court to enter other and further relief to which PIABA may be entitled as a matter of law, or which the Court determines to be just and proper, to compel the SEC to produce documents covered by PIABA's FOIA Request.

WHEREFORE, for these and other such reasons as the Court may find, Plaintiff PIABA requests the Court to enter a Declaratory Judgment against Defendant United States Securities and Exchange Commission.

DATED: December 22, 2011

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